U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 1525587

Date: SEPT. 3, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a senior software engineer under the second-preference, immigrant classification for members of the professions holding advanced degrees. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

After initially granting the filing, the Director of the Texas Service Center revoked the petition's approval and dismissed the Petitioner's following motion to reopen. The Director concluded that the Beneficiary violated his nonimmigrant visa status. The Director also invalidated the accompanying labor certification from the U.S. Department of Labor (DOL).

The Petitioner bears the burden of establishing eligibility for the requested benefit. Matter of Ho, 19 I&N Dec. 582, 589 (BIA 1988). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain DOL certification. See section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. Id. Labor certification also signifies that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. Id.

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. See section 245 of the Act, 8 U.S.C. § 1255.

"[A]t any time" before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If

supported by a record, a petition's erroneous approval justifies its revocation. Matter of Ho, 19 I&N Dec. at 590.

II. THE NOIR

USCIS may issue a notice of intent to revoke (NOIR) a petition's approval if the unexplained and unrebutted record at the time of the NOIR's issuance would have warranted the petition's denial. Matter of Estime, 19 I&N Dec. 450, 451 (BIA 1987). If a petitioner's NOIR response does not overcome validly stated revocation grounds, USCIS properly revokes a petition's approval. Id. at 451-52.

> Where a notice of intention to revoke is based on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained, even if the petitioner did not respond to the notice of intention to revoke.

Id. at 452.

Here, the Director's NOIR alleges the Beneficiary's violation of his nonimmigrant visa status and questions the Petitioner's intention to employ him in the offered position of senior software engineer.

A. The Beneficiary's Nonimmigrant Visa Status

On the accompanying labor certification, the Beneficiary attested to his employment in the United States since January 2005, including his work for the Petitioner since January 2008. The record contains copies of approval notices indicating that his U.S. employers obtained company-specific, H-1B nonimmigrant visa petitions allowing him to temporarily work for the employers during that time. See section 101(a)(15)(H) of the Act, 8 U.S.C. § 1101(a)(15)(H); 8 C.F.R. § 214.2(h). The NOIR alleges that the Beneficiary worked in the United States in 2005 for a company for which he was not authorized. The NOIR also alleges that he violated his nonimmigrant status by serving as an owner and corporate officer of a U.S. company that did not petition on his behalf.

The Beneficiary's alleged violations of nonimmigrant status might render him ineligible for adjustment of status, see 8 C.F.R. § 245.1(b)(4) (barring foreign nationals who worked without authorization from adjustment of status), or inadmissible to the United States, see section 212(a)(9)(B)(i) of the Act (rendering inadmissible aliens "unlawfully present" in the United States for more than 180 days). The status violations, however, would not have warranted the petition's denial.[1]

[1] Department of Homeland Security regulations do not require Form I-140 beneficiaries to maintain valid nonimmigrant status or to prove their admissibility to the United States to obtain petition approval. Rather, status violations and admissibility would be considered at the adjustment or immigrant visa stage. See Matter of O-, 8 I&N Dec. 295, 297 (BIA 1959) (holding that immigrant petition proceedings are inappropriate fora for addressing substantive issues of admissibility). Beneficiaries may even meet experience requirements of offered positions based on unauthorized employment in the United States. See Matter of Lam, 16 I&N Dec. 432, 434 (BIA 1978) (holding that gaining qualifying experience through unauthorized U.S. employment does not justify denial of adjustment of status on a discretionary basis).

The NOIR allegations cast doubt on the Beneficiary's claimed, qualifying experience for the offered position from January 2005 through June 2005. But the record included letters from other employers documenting the Beneficiary's acquisition of more than the five years of experience required for the offered position. The allegation regarding the Beneficiary's purported unauthorized employment in 2005 therefore would not have warranted the petition's denial.

The Beneficiary's ownership and officer status at a company other than his H-1B petitioner could cast doubt on six months of his claimed, qualifying experience in 2007. But the NOIR does not allege that, while the Beneficiary owned and served as an officer of the other company, he stopped working full-time for his H-1B petitioner. The NOIR therefore does not establish that the Beneficiary's alleged ownership and officer status at the other company affected his qualifying experience and would have warranted the petition's denial.

For the foregoing reasons, the Beneficiary's alleged status violations do not support the petition's revocation as issued.

B. The Bona Fides of the Job Offer

A business may file a petition if it is "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary pursuant to the terms and conditions of an accompanying labor certification. See Matter of Izdebska, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a denial where, contrary to the accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis). For labor certification purposes, "employment" means "[p]ermanent, full-time work." 20 C.F.R. § 656.3 (defining the term "employment").

The NOIR notes that the Petitioner is an information technology (IT) company that contracts its employees to work at various client sites throughout the United States. The NOIR requested additional evidence that the Petitioner - as opposed to clients, contractors, subcontractors, or other parties - would employ the Beneficiary, as well as documentation of the Petitioner's generation of sufficient business to continuously employ him in the offered position on a permanent, full-time basis.

The NOIR reasonably questioned the Petitioner's intention to employ the Beneficiary in the offered position. The nature of the Petitioner's business warranted proof of the company's ability to continuously employ the Beneficiary on a permanent, full-time basis. The decision, however, does not state the petition's revocation based on the bona fides of the job offer. Rather, the Director identified the revocation grounds as the Beneficiary's alleged violations of his nonimmigrant status and the invalidation of the accompanying labor certification. See 20 C.F.R. § 656.30(d) (authorizing USCIS to invalidate a labor certification after its issuance upon a finding of fraud or willful misrepresentation of a material fact involving the labor certification application).

As previously discussed, the Beneficiary's alleged violations of his nonimmigrant status do not support the petition's revocation. The NOIR did not identify or explain an alleged misrepresentation involving the labor certification. Thus, the invalidation of the labor certification also does not support the revocation. A revocation can only be grounded on, and a petitioner need only respond to, the allegations in a NOIR. Matter of Arias, 19 I&N Dec. 568, 570 (BIA 1988). A petitioner must receive

"the opportunity to offer evidence . . . in opposition to the grounds alleged for revocation of the approval." 8 C.F.R. § 205.2(b). Here, the Petitioner did not receive an adequate opportunity to explain or rebut an alleged misrepresentation. See also 8 C.F.R. § 205.2(c) (requiring USCIS to issue a written notification "that explains the specific reasons for the revocation") (emphasis added).[2]

For the foregoing reasons, we cannot sustain the petition's revocation. We will therefore withdraw the Director's decision and reinstate the validity of the labor certification.

III. ABILITY TO PAY THE PROFFERED WAGE

Although the revocation cannot be sustained, the record does not demonstrate the petition's approvability. The Petitioner has not established its ability to pay the proffered wage of the offered position.

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal income tax returns, or audited financial statements. Id.

Here, the labor certification states the proffered wage of the offered position of senior software engineer as $80,000 a year. The petition's priority date is February 5, 2008, the date DOL accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The Petitioner submitted copies of its federal income tax return for 2007 and the Beneficiary's IRS Form W-2, Wage and Tax Statement, showing that the Petitioner paid him $94,221.48 in 2008. But, at the time of the petition's approval in August 2008, the record lacked regulatory required evidence of the Petitioner's ability to pay the proffered wage in 2008, the year of the petition's priority date. Thus, contrary to 8 C.F.R. § 204.5(g)(2), the record did not establish the Petitioner's ability to pay the proffered wage "at the time the priority date is established."

The NOIR did not notify the Petitioner of this evidentiary deficiency. We will therefore remand the matter. On remand, the Director should issue a new NOIR informing the Petitioner of the deficiency and the need to submit copies of an annual report, federal tax return, or audited financial statements for 2008. The Petitioner may submit additional evidence of its ability to pay the proffered wage that year, including materials supporting the factors stated in Matter of Sonegawa, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

IV. THE REQUIRED EXPERIENCE

The record also does not establish the Beneficiary's possession of the minimum employment experience required for the offered position. A petitioner must demonstrate a beneficiary's possession

[2] The revocation decision also improperly included factual allegations from a USCIS site visit in 2015 as such allegations were not contained in the NOIR. Should the Director choose to do so, such allegations might be included in any new NOIR issued.

of all DOL-certified job requirements of a position by a petition's priority date. Matter of Wing's Tea House, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of a position. USCIS may neither ignore a certification term, nor impose additional requirements. See, e.g., Madany v. Smith, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears authority for setting the content of the labor certification") (emphasis added).

Here, the labor certification states the minimum requirements of the offered position of senior software engineer as a U.S. master's degree, or a foreign equivalent degree, in computer science, engineering, or a related field, plus two years of experience in the job offered or as a programmer analyst. The labor certification also states the Petitioner's acceptance of an alternate combination of education and experience in the form of a bachelor's degree and five years of experience. In addition, part H.14 of the labor certification, "Specific skills or other requirements," states: "Two years of required experience must be experience performing design, development, testing and implementation in MVC architecture using J2EE, JSP, JDBC, OOA/OOD, Rational Rose, XML and deploying EJBs on Weblogic/Websphere application server."

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained about seven years of full-time, qualifying experience. He stated the following employment:

- About one year, three months as a programmer analyst at a U.S. IT company from October 2006 through December 2007;
- About one year, three months as a senior developer/software engineer at another US IT company from July 2005 through September 2006;
- About six months as a software engineer at a third U.S. IT company from January 2005 through June 2005;
- About eight months as a senior software engineer at an Indian IT company from May 2004 through December 2004;
- About one year, seven months as a senior software engineer at another Indian IT company from October 2002 through April 2004; and
- About one year, 10 months as a software engineer at a third Indian IT company from January 2000 through September 2002.

To support claimed, qualifying experience, a petitioner must submit letters from a beneficiary's former employers. 8 C.F.R. § 204.5(g)(1). The letters must include the names, addresses, and titles of the employers, and describe the beneficiary's experiences. Id.

The Petitioner submitted letters from four of the Beneficiary's claimed six former employers, including all three of his former U.S. employers. Together, the letters document about five years and 10 months of experience. Contrary to 8 C.F.R. § 204.5(g)(1), however, the letter from the former Indian employer does not describe the Beneficiary's experience. Also, the letter states his employment from January 2000 through October 2002. The Beneficiary attested on the labor certification that he worked for that employer only through September 2002. See Matter of Ho, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). The record therefore does not establish the Beneficiary's possession of the requisite five years of qualifying experience for the offered position.

Also, the letters do not establish the Beneficiary's possession of all the required skills listed in part H.14 of the labor certification. The letters do not indicate that the Beneficiary designed, developed, tested, and implemented in "MVC architecture," used "JDBC" or "OOA/OOD," or deployed "EJBs on Weblogic/Websphere application server." Letters indicate that the Beneficiary used J2EE, JSP, Rational Rose, and XML. But the letters do not demonstrate that he gained the requisite two years of experience with those skills. The record therefore does not establish the Beneficiary's qualifying experience for the offered position.

On remand, the new NOIR should notify the Petitioner of the evidentiary deficiencies related to the Petitioner's ability to pay and the Beneficiary's experience. The NOIR should ask the Petitioner to explain the Beneficiary's inconsistent employment dates at the Indian employer and provide independent, objective evidence of his possession of the claimed, qualifying experience and skills. If supported by the record, the new NOIR may also raise additional, potential grounds of revocation.

The Director should afford the Petitioner a reasonable opportunity to respond to the new NOIR. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

V. CONCLUSION

The NOIR's allegations did not support revocation of the petition's approval. The Petitioner, however, did not demonstrate its ability to pay the proffered wage of the offered position from the petition's priority date, or the Beneficiary's possession of the minimum experience required for the offered position.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.